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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE, Plaintiff and Respondent, v. FRANK CUEVAS CENTINO, Defendant and Appellant.	2d Crim. No. B300124 (Super. Ct. No. 18CR07800) (Santa Barbara County)

After two mistrials, a jury found Frank Cuevas Centino guilty of felony infliction of corporal injury on a cohabitant (Pen. Code,[1] § 273.5, subd. (a)), and further found that he inflicted great bodily injury (§ 12022.7, subd. (e)). The trial court found he had a prior domestic violence conviction (§ 273.5, subd. (f)(1)), a prior strike conviction (§ 667, subds. (d)(1) & (e)(1)) and a prior serious felony conviction (§ 667, subd. (a)(1)). The court sentenced him to 17 years in state prison and imposed

[1] All undesignated subsequent statutory references are to the Penal Code.

various fines and fees including an $8,000 restitution fine. Centino claims the conviction was barred by double jeopardy, and that the court erred when it ordered fines and fees without determining his ability to pay. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Centino and the victim, referred to as Jane Doe (§ 293.5), were dating and had lived together. During an argument, Centino punched her, knocking her to the floor. He fractured her right eye socket and three bones in her nose, requiring that she undergo surgery.

In the first trial, Centino testified on cross-examination that he had been in street fights and had "over 33 knockouts." During an adjournment in Centino's trial, the trial judge conducted a chambers conference in an unrelated case. Present were defense attorneys from that case, a deputy district attorney, a senior deputy district attorney, and a chief deputy district attorney. The judge told them about a trial in which the victim suffered an orbital fracture and a broken nose. The judge said the victim was treated by a doctor who testified he was himself a mixed martial arts fighter and admitted fighting in bouts both "sanctioned and unsanctioned." The judge continued, "It gets better . . . ." He said the defendant in that case testified that he too participated in mixed martial arts and "was 30 and 0 on the street." The judge wondered why the prosecutor did not ask the defendant if the victim was one of the 30. He added, "That is the first thing I would have asked."

After the chambers conference, one of the defense attorneys who had been present realized the judge was talking about Centino's case and told Centino's attorney about the statements. Centino moved for recusal of the trial judge and a

mistrial. The motion acknowledged that the attorney who heard and reported the comments "perceived the court's intent as one of providing amusement." The prosecutor in Centino's case was not aware of the judge's statements until the defense filed its motion.

The judge recused himself. (Code Civ. Proc., § 170.1.) The presiding judge then heard the motion for mistrial. The prosecutor opposed the motion, noted that the trial was almost completed, and requested that a different judge complete it. (§ 1053; Code Civ. Proc., § 170.4, subd. (a)(2).) Instead, with consent of the defense, the court declared a mistrial. The court found legal necessity for a mistrial because the jurors were "time-qualified" through the end of the week and it was an "insurmountable" hurdle to transcribe the trial and have another judge ready to finish it.

The case was reset for a second trial. Centino entered a plea of "once in jeopardy." (§§ 1016, subd. 5, 1017, subd. 4.) The court denied the motion to dismiss, finding that the prosecutor did not goad the defense into moving for a mistrial, and the unavailability of the judge constituted legal necessity. Centino appeals from that ruling.

The jury in the second trial deadlocked and the court declared a mistrial. At the third trial, the jury found Centino guilty and found he caused great bodily injury. Following waiver of jury for trial on the priors, the trial judge found true the enhancements for prior domestic violence conviction, prior strike, and prior serious felony conviction.

The trial court sentenced Centino to 17 years in prison. The court read and considered the probation report, which recommended a $10,000 restitution fine. The report stated that at the time of his arrest, Centino was not employed in his

trade as a mason, but was working for a pool and spa company through Victory Outreach. The report stated he had no assets or monthly income.

Centino objected to the imposition of fines and fees pursuant to *People v. Dueñas* (2019) 30 Cal.App.5th 1157 (*Dueñas*), stating that he would not be able to pay them by the time of his release from prison. Noting that he presumably would earn pay in prison, the court imposed a restitution fine of $8,000. (§ 1202.4, subd. (b).) Centino was also ordered to pay a court operations assessment of $40 (§ 1465.8) and a conviction assessment of $30 (Gov. Code, § 70373).

DISCUSSION

Double jeopardy

The federal and state constitutions prohibit placing a person twice in jeopardy for the same offense. (U.S. Const., 5th Amend.; Cal. Const., art. I, § 15.) The discharge of a jury after jeopardy has attached but before the verdict is the equivalent of an acquittal and bars retrial unless there was legal necessity for the discharge, or the defense consented. (*Larios v. Superior Court* (1979) 24 Cal.3d 324, 329 (*Larios*).)

A double jeopardy claim is properly raised in a pretrial motion to dismiss. (*People v. Batts* (2003) 30 Cal.4th 660, 676 (*Batts*).) A defendant may raise the issue on appeal of the judgment following retrial. (*Id.* at pp. 676-678.) Because the double jeopardy issue is based on undisputed facts, we review the ruling de novo. (*People v. Davis* (2011) 202 Cal.App.4th 429, 438.)

A judge shall not make statements that are "inconsistent with the impartial performance of the adjudicative duties of judicial office," and shall not engage in ex parte

communications concerning a pending or impending proceeding. (Cal. Code Jud. Ethics, canons 2A & 3B(7).) Here, the trial judge appropriately disqualified himself because "[a] person aware of the facts might reasonably entertain a doubt that the judge would be able to be impartial." (Code Civ. Proc., § 170.1, subd. (a)(6)(A)(iii).)

Absence of a judge may constitute legal necessity for a mistrial. (*Larios*, *supra*, 24 Cal.3d at p. 330.) Thus, in *In re Carlos V.* (1997) 57 Cal.App.4th 522, the court found legal necessity for a mistrial existed where, as here, the trial judge disqualified himself because he had engaged in an ex parte communication about the case during trial.

Retrial is also permitted based on a defendant's consent to a mistrial. As a "general rule . . . the defendant's request for a mistrial constitutes consent that waives any double jeopardy claim." (*Batts*, *supra*, 30 Cal.4th at pp. 679-680.) The sole exception in federal law is where "the prosecutor intended by [their] misconduct to produce a mistrial." (*Id.* at p. 681, citing *Oregon v. Kennedy* (1982) 456 U.S. 667, 679.) There is no evidence of such an intent here.

California law recognizes an additional circumstance barring retrial following a mistrial requested by the defense: "when a prosecutor, believing that a particular jury is likely to return an acquittal, intentionally commits misconduct in order to improperly prejudice the jury and obtain a conviction." (*Batts*, *supra*, 30 Cal.4th at p. 689.) There is no evidence here that the prosecutor: (1) believed the jury was likely to acquit, (2) committed misconduct, or (3) attempted to improperly prejudice the jury.

Centino argues that the prosecution engaged in misconduct by failing to interrupt the judge's story, determine the identity and status of the case that was the subject of the story, and then advise the defense. We are not persuaded.

While *Batts* does not "attempt[] to articulate a double jeopardy test that will be applicable in all circumstances" (*Batts*, *supra*, 30 Cal.4th at p. 695), we decline Centino's invitation to extend existing law to bar retrial here. The record does not establish that the prosecutors who heard the judge's comments joined in the discussion, or even knew what case he was talking about. There was no misconduct.

Even in cases of prosecutorial misconduct, "the normal and usually sufficient remedy" is "either a declaration of mistrial followed by retrial, or a reversal of a defendant's conviction on appeal followed by retrial." (*Batts*, *supra*, 30 Cal.4th at p. 666.) Mistrial here was based on both Centino's request and manifest necessity. Accordingly, the prosecution was entitled to "'one complete opportunity to convict'" Centino at trial. (*People v. Anderson* (2009) 47 Cal.4th 92, 109.)

Fines and fees

Dueñas, *supra*, 30 Cal.App.5th 1157, 1164, held that due process requires a trial court to conduct a hearing to "ascertain a defendant's present ability to pay" before imposing a court operations assessment (§ 1465.8), a conviction assessment (Gov. Code, § 70373), or a restitution fine (§ 1202.4). The facts of *Dueñas* were unique and unlike the facts here. Dueñas was convicted of driving on a suspended license, based at least in part on her financial inability to pay previously imposed fines or fees required to reinstate her license. She and her husband were homeless, unemployed, and unable to provide even basic

necessities for themselves and their children. (*Dueñas*, at pp. 1160-1161.) The fines and fees in her case contributed to an ever-expanding cycle of criminal consequences for poverty. (*Id*. at p. 1163.)

Here, after determining that Centino would be able to earn pay during his lengthy prison sentence, and considering that he was gainfully employed at the time of his arrest, the court rejected the probation report's recommendation for the maximum fine and instead imposed a restitution fine of $8,000. In addition, the court imposed the court operations assessment and the conviction assessment, which are set by statute at $40 and $30, respectively. (§ 1465.8; Gov. Code, § 70373.)

The court must impose a restitution fine "[i]n every case where a person is convicted of a crime . . . unless it finds compelling and extraordinary reasons for not doing so and states those reasons on the record." (§ 1202.4, subd. (b).) The minimum restitution fine for a felony is $300 and the maximum is $10,000. (§ 1202.4, subd. (b)(1).)

"The restitution fine shall be set at the discretion of the court and commensurate with the seriousness of the offense." (§ 1202.4, subd. (b)(1).) In ordering a fine in excess of the $300 minimum, "the court shall consider any relevant factors, including, but not limited to, the defendant's inability to pay, the seriousness and gravity of the offense and the circumstances of its commission. . . . Consideration of a defendant's inability to pay may include [their] future earning capacity. A defendant shall bear the burden of demonstrating [their] inability to pay. Express findings by the court as to the factors bearing on the amount of the fine shall not be required. A separate hearing for the fine shall not be required." (§ 1202.4, subd. (d).)

While Centino timely objected based on *Dueñas*, he did not meet his statutory burden to show inability to pay. (§ 1202.4, subd. (d).) Counsel argued only the length of the sentence, and that prison earnings would not be enough to pay the fines and fees by the time of Centino's release. Counsel did not make an offer of proof of additional facts or request a further hearing.

The trial court properly acted within its discretion to set the amount of the restitution fine. The court considered Centino's ability to pay the fines and fees, including his ability to earn money in prison. (*People v. Aviles* (2019) 39 Cal.App.5th 1055, 1076; *People v. Castellano* (2019) 33 Cal.App.5th 485, 490.) With credit for time served and worktime credits (§ 2933.1, subd. (a)), Centino must serve approximately 13 years five months in prison. Prison wages currently range from $12 to $56 per month. (Cal. Code. Regs., tit. 15, § 3041.2; *Aviles*, at p. 1076.) The state may garnish up to 50 percent of those wages to pay a restitution fine. (§ 2085.5, subds. (a), (c).) Prison wages here could pay the $40 court operations assessment, the $30 conviction assessment, and a substantial amount of the restitution fine.

Even when prison wages will be inadequate to pay the entire amount, we may uphold a restitution fine based on potential employment after release. (*People v. Ramirez* (1995) 39 Cal.App.4th 1369, 1377.) Centino had been employed in the past as a mason, and was employed in another capacity at the time of his arrest. There is no evidence he would be unable to find employment after completion of his sentence. We conclude that substantial evidence supports the trial court's implied finding that the balance of the fines and fees could be paid after completion of the prison sentence. (*Id*. at p. 1377.)

Finally, inability to pay a restitution fine above the statutory minimum does not automatically invalidate it. (*People v. Potts* (2019) 6 Cal.5th 1012, 1056.) Inability to pay is but "a factor for the court to consider in setting the amount of a restitution fine, alongside 'any relevant factors.'" (*Id*. at p. 1057; *People v. Kramis* (2012) 209 Cal.App.4th 346, 350.) In setting the restitution fine here, the trial court considered Centino's ability to pay and properly exercised its discretion.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED.

TANGEMAN, J.

We concur:

GILBERT, P. J.

PERREN, J.

Gustavo E. Lavayen, Judge

Superior Court County of Santa Barbara

John Derrick, under appointment by the Court of Appeal, for Defendant and Appellant.

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